

George V. Granade  
*ggranade@reesellp.com*  
**REESE LLP**  
8484 Wilshire Boulevard, Suite 515  
Los Angeles, California 90211  
Telephone: (310) 393-0070  
Facsimile: (212) 253-4272

Michael R. Reese  
*mreese@reesellp.com*  
**REESE LLP**  
100 West 93rd Street, 16th Floor  
New York, New York 10025  
Telephone: (212) 643-0500  
Facsimile: (212) 253-4272

Sophia G. Gold (*pro hac vice* to be filed)  
*sgold@kaliellpc.com*  
**KALIEL PLLC**  
1875 Connecticut Avenue Northwest, 10th Floor  
Washington, District of Columbia 20009  
Telephone: (202) 340-4783

*Counsel for Plaintiff and the Proposed Class*

**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF NEW YORK**  
**ROCHESTER DIVISION**

MICHAEL LEE, *on behalf of himself and all  
others similarly situated,*

Plaintiff,

- against -

CANANDAIGUA NATIONAL BANK &  
TRUST,

Defendant.

No. 6:20-cv-06332-EAW

**PLAINTIFF'S NOTICE OF  
SUPPLEMENTAL AUTHORITY IN  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S  
AMENDED CLASS ACTION  
COMPLAINT**

Plaintiff Michael Lee respectfully submits this notice of supplemental authority to inform the Court of an additional recent order denying a motion to dismiss in a similar case, which was issued subsequent to the filing of Defendant's Reply in Further Support of Motion to Dismiss, ECF No. 17.

Plaintiff submits the order in *Leslie v. Redstone Federal Credit Union*, Case No. 5:20-cv-0629-LCB (N.D. Ala. Mar. 30, 2021), ECF No. 34 (attached as **Exhibit A**), in which the court denied a motion to dismiss in a similar case challenging a financial institution's practice of charging overdraft fees based on the "available balance" in the account rather than the actual balance. In a well-reasoned, 23-page order, Judge Liles Burke of the U.S. District Court for the Northern District of Alabama concluded the credit union's contract suffered from the same deficiencies that the U.S. Court of Appeals for the Eleventh Circuit identified in *Tims v. LGE Community Credit Union*, 935 F.3d 1228, 1234 (11th Cir. 2019); the court stated:

In addition to the provisions cited by Redstone, the Court has reviewed the entirety of the Opt-in Form and the Account Agreement and finds that they contain the same deficiencies that led to the Eleventh Circuit's holding in *Tims*. Although the term "available balance" is used at several points throughout the agreement, that alone cannot carry the day for Redstone. Indeed, the Eleventh Circuit rejected such reasoning in *Tims*: "LGE apparently assumes that the [consumer] will read the word available in [two separate] sections spanning the [12]-page Account Agreement and conclude that the financial institution uses the available balance calculation method in its overdraft service just because the agreement uses the term available. LGE assumes too much." 935 F.3d at 1239 (internal quotations and citations omitted).

Based on the Eleventh Circuit's holding in *Tims*, this Court finds that Redstone's motion to dismiss Leslie's breach-of-contract claim is denied because the plain language of both the Opt-In Form and the Account Agreement, read separately and together, did not "clearly articulate[] [Redstone's] balance calculation method for charging overdraft fees." *Id.* at 1242. Because the language is ambiguous after considering the plain language of the contracts, the parties' intent will become a question for a jury should neither party be granted summary judgment.

Ex. A at 18–19.

Date: March 30, 2021

Respectfully submitted,

By: /s/ George V. Granade

George V. Granade

*ggranade@reesellp.com*

**REESE LLP**

8484 Wilshire Boulevard, Suite 515

Los Angeles, California 90211

Telephone: (310) 393-0070

Facsimile: (212) 253-4272

Michael R. Reese

*mreese@reesellp.com*

**REESE LLP**

100 West 93rd Street, 16th Floor

New York, New York 10025

Telephone: (212) 643-0500

Facsimile: (212) 253-4272

Sophia G. Gold (*pro hac vice* to be filed)

*sgold@kaliellpc.com*

**KALIEL PLLC**

1875 Connecticut Avenue Northwest, 10th Floor

Washington, District of Columbia 20009

Telephone: (202) 340-4783

*Counsel for Plaintiff and the Proposed Class*